No. 97-934

In The

Supreme Court of the United States

October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF A MAJORITY OF MEMBERS OF THE OHIO GENERAL ASSEMBLY IN SUPPORT OF PETITIONERS

PAUL BENJAMIN LINTON
Attorney at Law
921 Keystone Avenue
Northbrook, Illinois 60062
(847) 291-3848

Counsel for the Amici

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INTEREST OF THE *AMICI*[1]

Amici curiae are a majority of the Members of the Ohio General Assembly who strongly support the public policy of the State of Ohio to restrict the use of the dilation and extraction ("D & X") abortion procedure and to prohibit most post-viability abortions. The bill enacting these provisions (Sub. H.B. 135) passed by overwhelming margins in the Ohio Senate (29-4) and House of Representatives (82-15).

Ohio's petition presents two substantive questions regarding abortion law: First, whether the States may restrict the use of a cruel and unusual abortion technique, a technique that borders on infanticide; and, second, whether the States may limit post-viability abortions to serious physical health reasons. The court of appeals held that Ohio could do neither. *Amici curiae* vigorously disagree with that judgment and ask that it be reversed.

The need for review of both questions is particularly acute. Since Ohio passed Sub. H.B. 135 in 1995, which restricts the use of the "dilation and extraction" abortion technique,[2] more than one-third of the States have

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[1] Counsel for the *amici* authored the brief in whole. No person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

[2] In a report issued by the AMA's Board of Trustees in May 1997 urging passage of the federal "Partial-Birth Abortion Ban Act of 1997," H.R. 1122, as amended, 105th Cong., 1st Sess. (1997), the AMA defined the term "intact dilation and extraction" as "a specific procedure comprised of the following elements: deliberate dilation of the cervix, usually over a sequence of days; instrumental or manual conversion of the fetus to a footling breech; breech extraction of the body

enacted statutes attempting to limit the use of this barbaric procedure,[3] for which there is little or no medical justification,[4] and many other States will be considering such legislation in their current sessions. Later this year, Congress is expected to vote on whether to override President Clinton's veto of H.R. 1122, the "Partial-Birth Abortion Ban Act of 1997." Both Congress and the States need to know whether, and under what circumstances, they may restrict the use of the "intact D & X" abortion

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excepting the head; and partial evacuation of the intracranial contents of the fetus to effect vaginal delivery of a dead but otherwise intact fetus." AMA Bd. of Trustees Report 26-A-97 ("Late-Term Pregnancy Termination Techniques") at 15.

[3] 1997 Ala. Act 485 (to be codified at Ala. Code § 13A-13-40 *et seq.*); Alaska Stat. § 18.16.050 (Michie Supp. 1997); Ariz. Rev. Stat. Ann. § 13-3603.01 (West Supp. 1997); 1997 Ark. Acts 984; Ga. Code Ann. § 16-12-144 (Supp. 1997); 1997 Ill. Laws 90-560; Ind. Code Ann. §§ 16-18-2-267.5, 16-34-2-1(b) (Michie Supp. 1997); 1997 La. Acts 906 (to be codified at La. Rev. Stat. Ann. §§ 14:32:9, 40:1299.35.3); Mich. Comp. Laws Ann. §§ 333.16221(m), 333.16226, 333.17016, 333.17516 (West Supp. 1997); Miss. Code Ann. § 41-41-73 (Supp. 1997); Mont. Code Ann. § 50-20-401 (1997); Neb. Rev. Stat. §§ 28-325, 28-326(9), 71-148 (Supp. 1997); 1997 N.J. Acts 262; Ohio Rev. Code Ann. § 2919.15 (Anderson 1996); R.I. Gen. Laws § 23-4.12-1 *et seq.* (Supp. 1997); S.C. Code Ann. § 44-41-85 (Law. Co-op. Supp. 1997); S.D. Codified Laws § 34-23A-27 *et seq.* (Michie Supp. 1997); Tenn. Code Ann. § 39-15-209 (1997); Utah Code Ann. § 76-7.310.5 (Supp. 1997).

[4] Noting that "there does not appear to be any identified situation in which the intact D & X is the only appropriate procedure to induce abortion," the AMA's Report on "Late-Term Pregnancy Termination Techniques" recommended that "the procedure not be used unless alternative procedures pose materially greater risk to the woman." AMA Bd. of Trustees Report 26-A-97 at 15. Section 2919.15 essentially embodies this recommendation.

technique. The definitive answer to that question can be provided only by this Court.

There is also a pressing need for this Court to determine whether the States may limit post-viability abortions to serious physical health reasons. Three-fourths of the States have enacted statutes attempting to restrict the reasons for which abortions may be performed late in pregnancy. Twenty States permit post-viability abortions to preserve the life or health of the pregnant woman, but do not define what the term "health" means.[5] Seven States expressly allow late-term abortions for mental health reasons, in addition to physical health reasons.[6]

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[5] Ariz. Rev. Stat. Ann. § 36-2301.01(A) (West 1993); Ark. Code Ann. § 20-16-705(a) (Michie 1991); Cal. Health & Safety Code §§ 123405, 123410 (West 1996), as interpreted in 65 Op. Att'y Gen. 261 (April 27, 1982); Conn. Gen. Stat. Ann. § 19a-602 (West 1997); Fla. Stat. Ann. § 390.0111(1) (West Supp. 1998); Ga. Code Ann. § 16-12-141(c) (Supp. 1997); 720 Ill. Comp. Stat. 510/5 (West 1996); Iowa Code Ann. § 707.7 (West Supp. 1997); Ky. Rev. Stat. Ann. § 311.780 (Michie 1995); La. Rev. Stat. Ann. § 40:1299.35.4(A) (West 1992); Me. Rev. Stat. Ann. tit. 22, § 1598 (1992 & Supp. 1997); Mich. Comp. Laws Ann. § 750.14 (West 1991), as construed in *People v. Bricker*, 208 N.W.2d 172, 175-76 (Mich. 1973); Minn. Stat. Ann. § 145.412 subd. 3 (West 1989); Mo. Rev. Stat. § 188.030(1) (West 1996); Mont. Code Ann. § 50-20-109(1)(c) (1997); Neb. Rev. Stat. § 28-329 (1995); Okla. Stat. Ann. tit. 63, § 1-732 (West 1997); S.D. Codified Laws § 34-23A-5 (Michie 1994) (after 24th week); Tenn. Code Ann. § 39-1-201(c)(3) (1997); Wis. Stat. Ann. § 940.15 (West 1996).

[6] Mass. Gen. Laws Ann. ch. 112, § 12M (West 1996) (during or after 24th week) (danger to life or grave impairment of physical or mental health); Nev. Rev. Stat. § 442.250 (Michie 1996) (after 24th week) (same); N.D. Cent. Code § 14-02.1-04(3) (1991) (same); S.C. Code Ann. § 44-41-20(c) (Law. Co-op. 1985) (life or physical or mental health); Tex. Rev. Civ. Stat. Ann. art. 4495b, § 4.011(d)(2) (West Supp. 1998) (prevent death or serious impairment to physical or mental health); Utah Code Ann.

Two States attempt to quantify the degree of risk to the pregnant woman, but do not limit such abortions to physical health reasons.[7] Five States purport to forbid abortions late in pregnancy except to save the life of the woman.[8] One State prohibits post-viability abortions except to prevent substantial permanent impairment to the life or physical health of the woman.[9] Finally, three States, including Ohio, have enacted statutes that permit post-viability (or late term) abortions to be performed only where the procedure is necessary to prevent the death of the woman or to prevent substantial and irreversible impairment of a major bodily function.[10]

Notwithstanding this Court's confirmation in *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), of "the State's power to restrict abortion after fetal viability, if the

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§§ 76-7-302(2), 76-7-302(3) (1995) (after 20th week) (prevent death or grave impairment to health), *see Jane L. v. Bangerter*, 794 F.Supp. 1537, 1544 (D. Utah 1992) (noting legislative intent not to exclude mental health from definition); Va. Code Ann. § 18.2-74(b) (Michie 1996) (prevent death or substantial and irremediable impairment of mental or physical health).

[7] N.C. Gen. Stat. § 14.45.1(b) (1993) (after 20th week) (danger to life or grave impairment of health); Wyo. Stat. Ann. § 35-6-102 (Michie 1997) (imminent peril that substantially endangers life or health).

[8] Del. Code Ann. tit. 24, § 1790(b)(1) (1987) (after 20th week); Idaho Code § 18-608(3) (1997); Kan. Stat. Ann. § 65-6703 (1992); N.Y. Penal Code §§ 125.00, 125.05, 125.45 (McKinney 1987) (after 24th week); R.I. Gen. Laws § 11-23-5 (1994).

[9] Ind. Code Ann. §§ 16-34-2-1(a)(3), 16-34-2-3 (Michie Supp. 1997).

[10] 1997 Ala. Acts. 442 (to be codified at Ala. Code § 13A-13-20 *et seq.*); Ohio Rev. Code Ann. § 2919.17 (Anderson 1996); 18 Pa. Cons. Stat. Ann. § 3211 (West Supp. 1997) (during or after the 24th week).

law contains exceptions for pregnancies which endanger the woman's life or health," the Court has not yet determined the scope of the mandated health exception and has denied review in two cases where that issue could have been considered. *See Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011, 1013 (1992) (Scalia, J., dissenting from the denial of *certiorari*); *Leavitt v. Jane L.*, 117 S.Ct. 2453 (1997). This is an appropriate case for the Court to provide guidance to state and federal courts as well as legislators "as they seek to address this subject in conformance with the Constitution." *Casey*, 505 U.S. at 845.

SUMMARY OF ARGUMENT

The first substantive issue presented by Ohio's petition is whether, contrary to this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), a woman has an absolute right "to terminate her pregnancy . . . in whatever way . . . she alone chooses." 410 at 153. Without deciding whether Ohio could restrict the use of the dilation and extraction procedure, as such, the court of appeals determined that the definition of the procedure in § 2919.15(A) failed to distinguish adequately between the dilation and extraction ("D & X") procedure and the dilation and evacuation ("D & E") procedure. A-21-27. As a consequence, "the Act's definition of the prohibited abortion method includes both the D & E and the D & X procedures," and "therefore bans the use of both . . . procedures." A-27. Relying upon this Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75-79 (1976), where the Court struck down a ban on the saline amniocentesis abortion method, and employing *Casey's* mode of analysis, the court of appeals held that a ban on the most

commonly used second trimester abortion technique constitutes an "undue burden" on women seeking such abortions and, therefore, is unconstitutional. A-27-29.

Without addressing the court of appeals' analysis of the scope of § 2919.15(A) or whether the affirmative defense set forth in § 2919.15(C) cures any infirmity found in the prohibition of § 2919.15(B)[11] *amici* submit that the court of appeals exceeded its authority in striking down § 2919.15 in its entirety. Regardless of the ultimate reach of the statute, it is undisputed that § 2919.15 applies to the abortion technique developed by Dr. Haskell, in which a fetus is partially delivered, then deliberately killed immediately before what would otherwise be a live birth.[12] Because that technique is seldom used, a ban on its use cannot be said to constitute an "undue burden" on women seeking second trimester abortions, especially in light of the broad affirmative defense set forth in § 2919.15(C). Any concern that the court of appeals had regarding the scope of the statutory definition could have been fully addressed by crafting an injunction that would have barred defendants from enforcing § 2919.15 against physicians using the more commonly used "D & E" procedure. That would have left the essential core of § 2919.15 intact. In failing to limit its ruling to the unconstitutional application of the statute (an "application" which the legislature never intended), the court of appeals violated the well-established principle " 'that a

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[11] *Amici* generally adopt petitioners' arguments on these points.

[12] Public awareness of the "D & X" procedure and the use of the term "dilation and extraction" originally came from a paper presented by Dr. Haskell at a National Abortion Federation Risk Management Seminar in 1992. *See* A-22 n.8.

federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.' " *Dalton v. Little Rock Family Planning Services*, 116 S.Ct. 1063, 1064 (1996) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)).

The second substantive issue presented by Ohio's petition is whether the States' authority to prohibit nontherapeutic, post-viability abortions is real or illusory. In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164-65.

In its alternative holding striking down Ohio's prohibition of most post-viability abortions (Ohio Rev. Code Ann. § 2919.17), the court of appeals held that Ohio may not limit post-viability abortions to physical health reasons, but must include mental health reasons, also. A-37-45. That holding was based upon a misreading of this Court's opinion in *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*. In *Bolton*, the Court held that in determining whether an abortion is "necessary," a physician may consider "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. at 192. Contrary to the court of appeals' understanding (A-45-46), *Doe v. Bolton* did not attempt to set the boundaries of the post-viability health exception mandated by *Roe v. Wade*, but rather resolved a vagueness issue in an abortion statute that applied throughout pregnancy.

Any doubt of Ohio's authority to limit post-viability abortions to serious physical health reasons is laid to rest by this Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Court upheld the "medical emergency" definition in the Pennsylvania Abortion Control Act. *Casey*, 505 U.S. at 879-80. In *Casey*, the Court held that Pennsylvania could require women and minors to comply with the informed consent, parental consent and waiting period requirements of Pennsylvania law, even though the resulting delay might result in some non-permanent major or permanent minor loss of bodily function. If the State is not required to carve out exceptions for these risks *before* viability, when it has *no* authority to proscribe abortion, then it should not be required to provide exceptions for these risks *after* viability, when it clearly *does* have such authority.

ARGUMENT

I. THE COURT SHOULD REVIEW THE SIXTH CIRCUIT'S JUDGMENT STRIKING DOWN OHIO'S RESTRICTIONS ON THE USE OF THE DILATION AND EXTRACTION ABORTION TECHNIQUE BECAUSE THE COURT OF APPEALS FAILED TO GIVE EFFECT TO THE CONSTITUTIONAL APPLICATIONS OF THE STATUTE.

Without deciding whether Ohio could restrict the use of the dilation and extraction abortion method, the court of appeals determined that the statutory definition of the procedure (§ 2919.15(A)) encompassed both the dilation and extraction ("D & X") procedure and the dilation and evacuation ("D & E") procedure. A-21-27. Because the "D & E" procedure is the most commonly used technique for early and mid-second trimester abortions, the court held that a ban on its use, even subject to the broad affirmative

defense provided in § 2919.15(B) created an "undue burden" on women seeking second trimester abortions and, therefore, was unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). A-27-29.

Amici agree with petitioners that the lower court misread the statutory definition, applied an incorrect standard of review and failed to give proper weight to the affirmative defense. But in addition to these errors in analysis, it is clear that the court overreached its authority in not giving effect to the constitutional applications of the statute, as required by Ohio law. That in itself requires reversal. *See Leavitt v. Jane L.*, 116 S.Ct. 2068 (1996).

Under Ohio law, "[i]f any provisions of a section of the Revised Code *or the application thereof to any person or circumstance* is held invalid, the invalidity does not affect other provisions *or applications of the section or related sections* which can be given effect without the invalid provision *or application*, and to this end the provisions are severable." Ohio Rev. Code Ann. § 1.50 (Anderson 1990) (emphasis added). Ohio mandates severance of invalid *applications*, as well as invalid *provisions*, of state law.[13] Severance is appropriate where it will not "fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 377 (Ohio 1994). It would be difficult to conclude that enjoining defendants from

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[13] In light of this general provision, the lack of specific severability language in Sub. H.B. 135 does not preclude severance. *See Papa Nick's Specialties, Inc. v. Harrod*, 747 F.Supp. 1240, 1242-43 (N.D. Ohio 1990).

enforcing § 2919.15 against physicians using the conventional "D & E" abortion technique would "fundamentally disrupt the statutory scheme" when it was never the intent of the Ohio General Assembly to restrict the use of that technique. Accordingly, if there was any question regarding the scope of § 2919.15(A), the court of appeals should have entered a limited injunction preventing defendants from applying § 2919.15 to physicians performing "D & E" abortions. That would have honored Ohio's statutory preference for severance of invalid applications and would have allowed the law to be enforced in its (intended) constitutional applications.[14]

Enjoining only the unconstitutional applications of the statute would not have required the court of appeals to "rewrite the Act." A-32. A more carefully tailored injunction was required by this Court's precedents. Less than two years ago, the Court reaffirmed the principle " 'that a federal court should not extend its invalidation of a statute farther than necessary to dispose of the case before it.' " *Dalton v. Little Rock Family Planning Services*, 116 S.Ct. 1063, 1064 (1996) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)). In *Brockett*, the Court stated that "the normal rule" is that "partial, rather than facial, invalidation is the required course." 472 U.S. at 504. This is the "required course" not only with respect to severance of unconstitutional *provisions*, but also with respect to unconstitutional *applications*.[15] Although the

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[14] The same error infected the court of appeals' refusal to sever the purportedly invalid *pre*-viability applications of § 2919.15 from the presumptively valid *post*-viability ones. A-30-32.

[15] In *Brockett*, a state obscenity statute prohibiting both protected and unprotected speech was struck down only in its

Court does not "normally grant petitions for certiorari solely to review what purports to be an application of state law," it "undoubtedly should do so where [as here] the alternative is allowing blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 116 S.Ct. 2068, 2072 (1996).

II. THE COURT SHOULD REVIEW THE SIXTH CIRCUIT'S JUDGMENT STRIKING DOWN OHIO'S PROHIBITION OF POST-VIABILITY ABORTIONS BECAUSE THE COURT OF APPEALS ERRONEOUSLY HELD THAT OHIO MUST ALLOW SUCH ABORTIONS TO BE PERFORMED FOR MENTAL HEALTH REASONS.

The court of appeals held that Ohio's statute prohibiting post-viability abortions, Ohio Rev. Code Ann. § 2919.17, is unconstitutionally vague because it lacks a *scienter* requirement. A-34-40. The court held further that the statute is unconstitutional because it also lacks a "mental health exception." A-40-49. In this Argument, *amici* will focus on why this Court should review the latter holding.[16]

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invalid applications. 472 U.S. at 501-05. *See also Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (holding unconstitutional state statute authorizing the use of deadly force against fleeing suspects, not on its face, but insofar as it authorized the use of lethal force against unarmed and nonviolent suspects); *United States v. Grace*, 461 U.S. 171, 175, 183 (1983) (accepting argument that federal statute prohibiting demonstrations on the Supreme Court grounds could not constitutionally be applied to picketing on the public sidewalks surrounding the building while rejecting argument that statute was invalid on its face).

[16] *Amici* adopt petitioners' vagueness argument.

Ohio prohibits a physician from performing an abortion after viability unless he determines, "in good faith and in the exercise of reasonable medical judgment," that the procedure is "necessary to prevent" either "the death of the pregnant woman" or "a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." Ohio Rev. Code Ann. § 2919.17(A)(1). "Serious risk of the substantial and irreversible impairment of a major bodily function," in turn, is defined as "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function," including, but not limited to, the conditions of pre-eclampsia, inevitable abortion, premature ruptured membrane, diabetes, and multiple sclerosis. § 2919.16(J). "On its face," this definition "appears to be limited to physical health risks, as opposed to mental health risks," as the court of appeals noted. A-41.

Relying principally upon a misreading of this Court's opinion in *Doe v. Bolton*, 410 U.S. 179 (1973), the court of appeals held that States may not restrict post-viability abortions to physical health reasons, but must include mental health reasons, as well. A-37-45. In *Doe v. Bolton*, the Court held that in determining whether an abortion is "necessary," as that term was used in the Georgia abortion statute, a physician may consider "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. at 192 (citing *United States v. Vuitch*, 402 U.S. 62 (1971)). The court of appeals interpreted the broad language of *Doe v. Bolton* as limiting the authority of the State, under *Roe v. Wade*, 410

U.S. 113 (1973), to forbid abortions after viability. A-45-46. That interpretation was wrong.

First, in *Casey*, this Court "reaffirm[ed] *Roe's* holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. at 164-65). The Court's failure to cite *Bolton* in the context of confirming the State's authority to proscribe post-viability abortions cannot be regarded as inadvertent and indicates that the Court did not regard *Bolton* as defining the health exception which must be allowed for post-viability abortions.

Second, in *Casey*, the Court noted that it is only in "rare circumstances in which the pregnancy is itself a danger to [a woman's] own life or health." 505 U.S. at 851.[17] The Court's awareness that abortions are rarely performed for reasons of life or health[18] indicates that, in

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[17] "Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control," *Casey*, 505 U.S. at 856, and not out of any concern that the pregnancy itself has created a threat to the woman's life or health. *See* Aida Torres and Jacqueline Darroch Forrest, *"Why Do Women Have Abortions?"*, 20 Family Planning Perspectives 169, 170 (Table 1) (July/August 1988).

[18] In its May 1997 Report, the AMA stated: "Although third-trimester abortions can be performed to preserve the life or health of the mother, they are, in fact, generally not necessary for those purposes. Except in extraordinary circumstances, maternal health factors which demand termination of the pregnancy can be accommodated without sacrifice of the fetus,

referring to the post-viability abortions which must be allowed under *Roe v. Wade*, the Court could not have had in mind the completely open-ended language of *Doe v. Bolton*. *See also, id.*, at 856 (viability marks the stage in pregnancy at which the "State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

Third, in *Casey*, the Court stated that "[i]n some broad sense it might be said that a woman who fails to act [to obtain an abortion] before viability has consented to the State's intervention on behalf of the developing child." 505 U.S. at 870. The Court's recognition of the State's authority to "interven[e] on behalf of the developing child" after viability cannot be reconciled with the lower court's view that *Doe v. Bolton* in large measure limits the State's power to prohibit post-viability abortions.

Finally, in *Casey*, the Court upheld the definition of "medical emergency" in the Pennsylvania Abortion Control Act. 505 U.S. at 879-80. Under the Act, the presence of a medical emergency excuses compliance with the informed-consent, twenty-four-hour waiting period, and parental-consent provisions of the law. "Medical emergency" is defined as a "condition which . . . so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major

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and the near certainty of the independent viability of the fetus argues for ending the pregnancy by appropriate delivery." Report 26-A-97 at 15.

bodily function." 18 Pa. Cons. Stat. Ann. § 3203 (West Supp. 1997).

The medical emergency definition was challenged as being underinclusive because it purportedly did not include three conditions which could cause severe health risks to the pregnant woman – preeclampsia, inevitable abortion, and premature ruptured membrane. *Casey*, 505 U.S. at 880.[19] The Court noted that "under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences." *Id.* The Court agreed with the Third Circuit that the phrase "serious risk" in the medical emergency definition should be construed to include such circumstances " 'to assure that compliance with [the State's] abortion regulations would not in any way pose a significant threat to the life or health of a woman.' " *Id.* (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 701 (3d Cir. 1991)).[20] Having adopted this construction, the Court held that "the medical emergency definition imposes no undue burden on a woman's abortion right." *Id.*

In upholding Pennsylvania's medical emergency definition, the Court essentially determined that Pennsylvania could require women and minors to comply with the

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[19] These conditions, along with diabetes and multiple sclerosis, are specifically included in Ohio's definition of "serious risk of the substantial and irreversible impairment of a major bodily function." Ohio Rev. Code Ann. § 2919.16(J).

[20] As the court of appeals noted, A-42, "the definition in *Casey* was clearly limited to physical health risks," which also reflected the Third Circuit's understanding, *see Planned Parenthood v. Casey*, 947 F.2d at 701 ("[t]he essence of the definition . . . is that it allows a woman and her doctors to forego many of the [Abortion Control] Act's requirements when there is a medical emergency to the woman's physical health").

informed consent, parental consent and waiting period requirements, even though the resulting delay might result in some non-permanent major or permanent minor loss of bodily function.[21] If the State is not required to carve out exceptions for these risks *before* viability, when it has *no* authority to prohibit abortion, then it necessarily follows that the State should not be required to provide exceptions for them *after* viability, when it clearly *does* have such authority. The language in the Ohio statute is indistinguishable from that found in the "medical emergency" definition in the Pennsylvania statute upheld by this Court in *Casey*. *See also* Ohio Sub. H.B. 135, § 4 (adopting this Court's construction of phrase, "serious risk of the substantial and irreversible impairment of a major bodily function").[22]

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[21] "[T]he wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance [with the regulations]. *Planned Parenthood v. Casey*, 947 F.2d at 701.

[22] In *Casey*, plaintiffs argued that the medical emergency definition was too narrow because it foreclosed the possibility of an immediate abortion despite some significant health risks. This Court commented, "If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. 410 U.S. at 164. *See also Harris v. McRae*, 448 U.S. at 316." *Casey*, 505 U.S. at 880. This quote is important for two reasons: First, in discussing the "health" exception, the Court cited *Roe* and *Harris v. McRae*, but not *Doe v. Bolton*. Second, by citing to the portion of *Roe* requiring a health exception in a statute prohibiting post-viability abortions and stating that it would be required to invalidate the "medical emergency" definition if it violated that standard, the Court clearly tested

Prior to *Casey*, three federal courts held or implied that *Doe v. Bolton* limits the authority of the States to prohibit post-viability abortions. *See Margaret S. v. Edwards*, 488 F. Supp. 181, 196 (E.D. La. 1980) (striking down statute prohibiting post-viability abortions unless the procedure was necessary "to prevent the death of the pregnant woman or to prevent permanent impairment to her health"); *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981), *aff'd per curiam sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (invalidating statute prohibiting abortion after viability unless the procedure was "necessary to preserve the woman from an imminent peril that substantially endangers her life or health"); *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 299 (3d Cir. 1984) (implying that if the State had attempted to prohibit post-viability abortions for psychological or emotional reasons, such a limitation would have been invalid), *aff'd*, 476 U.S. 747 (1986). Each of these opinions, as well as the court of appeals' opinion in this case, misread *Doe*.

At issue in *Doe* was not the authority of a State to prohibit post-viability abortions, which was addressed in *Roe*, but whether what remained of an abortion statute after major portions of it had been struck down could be enforced. In 1968, Georgia enacted an abortion statute

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and upheld the language, "serious risk of substantial and irreversible impairment of a major bodily function," by the very same "health" standard which should be applied in this case. The court of appeals thus erred in distinguishing *Casey* on the apparent assumption that there is a different "health" standard for post-viability prohibitions and pre-viability regulations that only delay abortions. A-41-45.

which prohibited a physician from performing an abortion unless he determined, "based upon his best clinical judgment," that the procedure was "necessary" because:

"(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

"(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

"(3) The pregnancy resulted from forcible or statutory rape." *Doe v. Bolton*, 410 U.S. at 202 (quoting statute).[23]

The district court held that "the reasons for an abortion may not be proscribed," and struck down the enumerated exceptions as too restrictive. *Doe v. Bolton*, 319 F.Supp. 1048, 1056 (N.D. Ga. 1970). As a result of this decision, a physician could perform an abortion whenever he determined, in his "best clinical judgment," that the procedure was "necessary." *Id.* at 1058. Plaintiffs appealed, claiming "that the word 'necessary' [did] not warn the physician of what conduct is proscribed; that the statute [was] wholly without objective standards and [was] subject to diverse interpretation; and that doctors [would] choose to err on the side of caution and [would] be arbitrary." *Bolton*, 410 U.S. at 191. This Court disagreed:

> The vagueness argument is set at rest by the decision in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), where the issue was raised with respect to a . . . statute making abortions criminal "unless the same were done as necessary for

[23] The statute also required the concurrence of two other physicians and the approval of a hospital review committee.

> the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." That statute has been construed to bear upon psychological as well as physical well-being. This being so, [we] concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id.* at 72. This conclusion is equally applicable here. Whether . . . "an abortion is necessary" is a professional judgment that the . . . physician will be called upon to make routinely.
>
> We agree with the District Court . . . that the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health.

Id. at 191-92.

A careful reading of *Doe v. Bolton* reveals that the Court was concerned with resolving a vagueness problem in an exception to an abortion prohibition which applied throughout pregnancy, not with defining the nature of the post-viability health exception mandated by *Roe v. Wade*. The court of appeals' judgment that *Doe v. Bolton* limits the authority of the States to prohibit post-viability abortions and mandates a mental health exception was wrong and should be reversed.[24]

[24] The court's assumption that "the problems associated with a mental health exception" could be avoided by limiting such an exception to "severe irreversible risks of mental and emotional harm," A-49, cannot be reconciled with the broad and

CONCLUSION

For the foregoing reasons, *amici curiae*, a majority of the Members of the Ohio General Assembly, respectfully request that the petition for *certiorari* be granted.

Respectfully submitted,

PAUL BENJAMIN LINTON
Attorney at Law
921 Keystone Avenue
Northbrook, Illinois 60062
(847) 291-3848

Counsel for the Amici

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open-ended language of *Doe v. Bolton*, 410 U.S. 191-92, as the district court noted in *Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (E.D. La. 1980). The experience of the only State that ever attempted to restrict mental health abortions by strictly defining a standard for approving such abortions suggests that the lower court's confidence that a carefully drafted mental health exception would not be abused is unwarranted.

In 1967, California enacted its "Therapeutic Abortion Act." Under the Act, a woman could not obtain an abortion for mental health reasons unless she proved to the satisfaction of a committee of physicians that she was a danger to herself or to others. Cal. Health & Safety Code § 123415 (West 1996) (the standard for civil commitment). Despite the fact that pregnancy is a normal condition, 61,572 abortions were performed in California in 1970 (98.2% of all abortions) on grounds of "mental health." *See People v. Barksdale*, 503 P.2d 257, 265 (Cal. 1972). An exception that has no measurable boundaries is not an exception – it is the rule.